UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California, Respondent and Appellant, vs. WILLIAM J. BOWIE, Petitioner and Appellee.	)	No. 22569

APPELLANT'S REPLY BRIEF

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I

APPELLEE WAS NOT DENIED THE RIGHT OF CONFRONTATION AND CROSS-EXAMINATION OF WITNESSES.

Appellee initially contends that the instant case is controlled by Barber v. Page, 390 U.S. 719 (1968). (Appellee's Brief, p. 12). That case held that the preliminary hearing testimony of a witness is not admissible at the trial in the absence of a showing that the witness is unavailable. Barber v. Page is not applicable to the case at bar since the case was not submitted on the basis of the preliminary hearing transcript but rather was decided pursuant to a trial in the Superior Court.

Appellee contends that the preliminary hearing transcript was considered by the trial court. To support this contention appellee attempts to rely on the presumption that official duty is presumed to have been duly performed. Cal.

Code Civ. Proc. § 1963(15). He then contends that where a case is submitted to the court on the basis of the preliminary hearing transcript the court has a duty to read the transcript and it is therefore presumed that the court read and considered the transcript. However, such presumption is not applicable since the instant case was not submitted to the court on the basis of the preliminary hearing. The trial court record clearly shows that when the prosecutor asserted that the case was being submitted on the basis of the preliminary hearing transcript, the trial judge asked the appellee if he was submitting the case on the transcript and the appellee replied that he wanted the witnesses present to have the privilege of cross-examining them. The court accepted the appellee's request and thereafter the prosecution presented its case in chief consisting of the testimony of the two arresting officers. Thereafter the appellee testified and the judge found the appellee guilty. Thus, the case was not submitted on the basis of the preliminary hearing but rather, after appellee clearly refused to submit the case on that basis and demanded that the witnesses testify, the trial court had the prosecution go forward with its case in chief. Thus, the case was decided on the basis of the testimony presented in court and not on the basis of the preliminary hearing transcript.

Finally, appellee contends that "even if the transcript was not formally admitted the transcript contained the victim's testimony was used by the appellee to cross-examine Officer Finnegan and was before the trial court in that posture." (Appellee's Brief, p. 18:16-18). In other words, appellee

maintains that a defendant's use of a preliminary hearing transcript for purposes of impeaching prosecuting witnesses violates his right of confrontation and cross-examination of witnesses. To state the proposition is to refute it. The mere fact that a defendant uses portions of the preliminary hearing transcript for impeachment purposes clearly does not violate his right to confront the witnesses who testified at the preliminary hearing.

II

A STATE COURT HAS NO CONSTITUTIONAL DUTY TO ADVISE A SELF-REPRESENTED CRIMINAL DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO DECLINE TO TESTIFY OR OF THE POTENTIAL CONSEQUENCES OF AN ELECTION TO TESTIFY. IF ADOPTED, SUCH A RULE MUST BE MADE PURELY PROSPECTIVE.

The District Court held that the federal Constitution imposes upon state trial courts a duty to advise self-represented criminal defendants of their constitutional right to decline to testify and of the possible consequences of an election to testify. This holding is unprecedented. We submit that the District Court erred both in its holding on the substantive issue and in permitting its newly announced rule to serve as a basis for collateral attack.

The District Court based its holding upon two California cases, three federal cases, and upon its faulty analogy to Miranda v. Arizona, 384 U.S. 436 (1966).

People v. Glaser, 238 Cal.App.2d 819, 48 Cal.Rptr. 427, (1965), restated the holding of People v. Kramer, 227 Cal.App.2d 199, 38 Cal.Rptr. 487 (1964), that an unrepresented defendant must be advised that he need not take the stand.

Glaser and Kramer rest exclusively upon California Constitution, article I, section 13; the admonition is required as a matter of state law. The District Court's statement that these cases rest upon alternative state and federal grounds (Op., 6) is an error of law not repeated by appellee. (Appellee's Brief, 20.)[1/]

We note that another state has declined to adopt the rule announced in Kramer. Wright v. State, 285 S.W.2d 762 (Tex. 1955). We note also that California, in Glaser, refused to allow as grounds for collateral attack an alleged violation of the rule announced in Kramer.

Three federal decisions were cited in support of the opinion below. United States v. Luxenberg, 374 F.2d 241 (6th Cir. 1967), contained dictum stating that a defendant appearing before a federal grand jury must be admonished that he need not make self-incriminating statements. A defendant has no right to have counsel present during federal grand jury proceedings. Fed.R. Crim. P. 6(d). Thus, he is truly unrepresented. A defendant in a state criminal trial has the right to have retained or appointed counsel present at all times. One who waives that right is not unrepresented but self-represented. A self-represented defendant is not entitled to more judicial protection than an unrepresented person.

Cliett v. Hammonds, 305 F.2d 565 (5th Cir. 1962),

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1. An examination of the authorities relied upon in Kramer will disclose that they, too, do not posit a federal constitutional rule. See Cochran v. State, 117 So.2d 544 (Fla. 1960); People v. Chlebowy, 191 Misc. 768, 78 N.Y.S.2d 596 (Sup. Ct. 1948); People v. Morett, 272 App.Div. 96, 69 N.Y.S.2d 540 (1947); State v. Lucas, 24 Conn.Supp. 353, 190 A.2d 511 (1963); Stevens v. State, 232 Md. 33, 192 A.2d 73 (1963).

also cited, merely held that failure to advise a defendant of the right to refuse to testify in a criminal contempt proceeding was an error of federal procedure.

Only Kershner v. Boles, 212 F.Supp. 9 (N.D. W.Va. 1963), cited below, involved a state defendant. At sentencing, Boles was asked by the trial court to identify himself as the subject of a prior conviction. He did so and was sentenced as a recidivist. Contrary to a mandatory provision of state law, Boles was not informed of the purpose of the inquiry nor was he in any way cautioned about the effect of an affirmative answer. Because the state court failed to proceed in accordance with state law, Boles was denied due process of law. See Spry v. Boles, 299 F.2d 332 (4th Cir. 1962), relied upon in Kershner.

Overlooked by the District Court are Wilson v. United States, 162 U.S. 613, 623-24 (1896), and Powers v. United States, 223 U.S. 303, 313-14 (1912), holding that an unrepresented accused appearing before a magistrate need not be apprised of his right to remain silent.[2/] Both cases come close to holding that the warning is not constitutionally required for any witness. United States v. Cleary, 265 F.2d 459, 462 (2d Cir. 1959).

Finally, the District Court reasoned that since trial court proceedings, like police station interrogations, can be inherently coercive, defendants are entitled to be advised of their Fifth Amendment rights in both situations.

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2. The precise holdings are changed by Fed.R. Crim. P. 5(b).

Cf. Miranda v. Arizona, supra. Few analogies which liken open court proceedings to secret interrogations, which equate unlawful coercion by the State with self-coercion, and which compare recorded proceedings with unrecorded events could survive analysis; this is not one. Miranda seeks to regulate the relationship between citizens and law enforcement, to remove conditions conducive to coercion which may result in unreliable self-incrimination, and to substitute prophylactic measures for the rather unworkable traditional test of voluntariness. None of these goals would be achieved by the admonition which appellee urges upon this Court.

Once a criminal defendant has elected to proceed in propria persona, and has effectively waived counsel,

> "[H]e assumes for all purposes connected with his case, and must be prepared to be treated as having, the qualifications and responsibilities concomitant with the role he has undertaken; he is not entitled either to privileges and indulgences not accorded attorneys or to privileges and indulgences not accorded defendants who are represented by counsel." People v. Mattson, 51 Cal.2d 777, 794, 336 P.2d 937 (1959). Accord, People v. Bowie, 200 Cal.App.2d 291, 295, 19 Cal.Rptr. 217 (1962). "The trial judge . . . has no duty to give [the] defendant a legal education . . . ." Ibid. Accord, People v. Williams, 174 Cal.App.2d 364, 382, 345 P.2d 47 (1959). O'Brien v. United States, 376 F.2d 538, 542 (1st Cir. 1967), vacated on other grounds, United States v. O'Brien,

___ U.S. ___, 20 L.Ed.2d 672 (1968).

A defendant, by electing to represent himself, cannot transform the adversary process into an exercise in judicial paternalism.

Numerous constitutional rights are silently waived during the course of every criminal trial. We cannot conclude that the right waived here without judicial advice is more important to the accused or to criminal defendants generally than other commonly waived rights, including the right to challenge the composition of grand and petit juries, to object to admission of evidence on Fourth Amendment grounds, or to assert the Sixth Amendment right of confrontation by cross-examination. Must a state court judge warn a self-represented defendant whenever, by inaction, he may waive a constitutional right? Must that judge then explain to the accused all of the consequences of such a waiver so that it later may be held intelligent and understanding? Such a requirement would convert the courtroom into a classroom, the trial judge into a law lecturer.

One commentator has accurately observed that,

> "It would be an impossible burden on court administration to require that every waiver be recorded. Indeed, most trial waivers cannot be registered because they do not consist of affirmative acts . . . ." Comment, 54 Calif.L.Rev. 1262, 1293 (1966).

Because it would intolerably burden trial courts to demand that they advise criminal defendants of each of their

constitutional rights and to explain the ramifications of waiver, and because such a requirement would result in a nonadversary proceeding, defendants who insist upon the self-indulgence of self-representation must be presumed competent.

Were this Court to conclude that the state procedural rule announced in Kramer should be given constitutional dimension it would not avail appellee. Bowie would not be entitled to benefit from the new law because it would necessarily be purely prospective.

Appellee asserts that the State may not press non-retroactivity as grounds for reversal for the first time upon appeal. Appellee's Brief, 24. As authority for a general rule that an appellant may not urge as a ground for reversal a theory not presented in the trial court, appellee relies upon Davis v. California, 341 F.2d 982, 986 (9th Cir. 1965); Chester v. California, 355 F.2d 778, 781 (9th Cir. 1966); and Flemings v. Wilson, 365 F.2d 267 (9th Cir. 1966).

In these cases the Court of Appeals refused to consider contentions which habeas corpus petitioners had failed to raise in the District Court. The petitioners' new contentions were unrelated to those properly raised. The matter of retroactivity, however, is integral to any new constitutional claim. Where the trial court makes new constitutional law, the State always is free to argue nonretroactivity on appeal. To permit such a significant question to go by default would indeed be a miscarriage of justice. The requirement that a petitioner first raise his contentions in the trial court forecloses no constitutional claims; the applicant has merely to file a new

petition setting forth his additional contentions. Because the State has no such remedy, and because retroactivity is integral to any new constitutional claim, the State may initially raise the purely legal question of retroactivity on appeal where, as here, the petitioner is afforded an adequate opportunity to contest the matter.

Appellee next attempts to avoid nonretroactivity by arguing that prior to 1962, when his judgment became final, federal and state decisions required that state criminal defendants be advised of their right to refuse to take the stand. He relies upon Carnley v. Cochran, 369 U.S. 506 (1962), and upon Killpatrick v. Superior Court, 153 Cal.App. 2d 146, 314 P.2d 164 (1957). Carnley held only that in a case in which the right to counsel, unless intelligently waived, was guaranteed by the Fourteenth Amendment, waiver could not be presumed from a silent record. Carnley did not impose upon state court judges a constitutional duty to admonish self-represented defendants.

Killpatrick held only that in failing to advise self-represented defendants of their right not to testify, the trial judge, under the circumstances of that case, erred as a matter of state law. Killpatrick rested solely upon California Constitution, article I, section 13. Killpatrick did not formulate a federal constitutional rule. Until the District Court announced its decision in appellee's case, no court recognized a constitutional duty to warn self-represented defendants of their rights. The matter of retroactivity, we think, cannot be avoided.

Appellee's judgment of conviction became final well before the Fifth Amendment was made applicable to the states via the Fourteenth Amendment in Malloy v. Hogan, 378 U.S. 1 (1964). For this reason, we urge that any new constitutional rule formulated in this case must be made purely prospective. See Linkletter v. Walker, 381 U.S. 618, 621-22 (1965). Further, Bowie seeks to vindicate a right itself dependent upon another right, that recognized in Malloy. He is not entitled to benefit from Malloy, for that case does not operate prospectively. Since he cannot claim the fundamental right announced in Malloy, he is in no position to claim the ancillary right asserted here.

We consider first the reasons for denying Malloy retroaction; we then review the reasons for treating similarly the right urged here. Should this Court accept our arguments in favor of pure prospectivity, any new rule enunciated in this case would be dictum. The substantive issue, then, would not be ripe for decision.

> "The criteria guiding resolution of the [retroactivity] question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Stovall v. Denno, 388 U.S. 293, 297 (1967); accord, Johnson v. New Jersey, 384 U.S. 719, 727 (1966); Tehan v. Shott, 382 U.S. 406, 413 (1966);

Linkletter v. Walker, 381 U.S. 618, 636 (1965).

Where the purpose of the new rule is to enhance the reliability of the fact-finding process, it will be applied retroactively because prior convictions are of doubtful reliability. See Gideon v. Wainwright, 372 U.S. 335 (1963); Jackson v. Denno, 378 U.S. 368 (1964). Where the rule does not affect "the very integrity of the fact-finding process" and there exists no "clear danger of convicting the innocent," retroactivity is not appropriate. Johnson v. New Jersey, supra at 728. Accord, Tehan v. Shott, supra; DeStefano v. Woods, ___ U.S. ___, 88 S.Ct. 2093 (1968).

In Tehan v. Shott, the Supreme Court held that infringement of the privilege against self-incrimination by prosecutorial or judicial comment on a defendant's failure to take the stand could not be collaterally raised to attack judgments which became final prior to its condemnation of such practice in Griffin v. California, 380 U.S. 609 (1965). The high court reasoned that, since "the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth," Griffin did not affect the reliability of past procedures resulting in conviction. Tehan v. Shott, supra at 416.

The purpose of the Griffin rule is no different from the purpose of the Malloy rule; both protect the same complex of values represented by the privilege against self-incrimination. Tehan v. Shott, supra at 414. If Griffin is denied retroactive effect so must be Malloy. A recent commentator noted:

"Malloy v. Hogan, [footnote omitted] . . . is most

closely analogous to Linkletter. Presumably a conviction is not rendered unreliable because it is based on damaging testimony elicited in open court." Note, Retroactivity of Judicial Decisions: Linkletter v. Walker, 13 U.C.L.A.L.Rev. 422, 429 (1966).

Clearly, "the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, . . ." Tehan v. Shott, supra at 415.

The reliance by law enforcement on the law as it existed prior to Malloy was entirely justifiable in light of earlier decisions by the Supreme Court holding that the privilege against self-incrimination was not safeguarded against state action by the Fourteenth Amendment. Twining v. New Jersey, 211 U.S. 78 (1908); Adamson v. California, 332 U.S. 46 (1947); Cohen v. Hurley, 366 U.S. 117 (1961); Snyder v. Massachusetts, 291 U.S. 97 (1934). In Tehan, the Court acknowledged that such reliance was invited and proper. Tehan v. Shott, supra at 417.

Retroactive application of Malloy would adversely affect the administration of justice. Cf. Tehan v. Shott, supra at 418-19. "Since there is reason to suppose that the results flowing from retroactivity would be just as severe in Malloy as in Linkletter the courts would be justified in limiting the future application of Malloy to cases on direct appeal." Note, 13 U.C.L.A.L.Rev., 422, 429.

All relevant considerations militate in favor of prospectivity for Malloy. Bowie, in effect, lacks standing

to claim the indirect fruits of Malloy because he shares in its direct fruits.

The basic rationale compelling prospectivity for Malloy applies to the question of making retroactive a rule requiring trial courts to admonish self-represented defendants of their right to refuse to testify. The purpose of this warning would be to prevent unwitting or unwilling waiver of Fifth Amendment rights. This was the purpose of the admonition of the right to remain silent required by Miranda, supra. In Johnson v. New Jersey, supra, the Court refused to apply Miranda retroactively. Indeed, there is less danger of coercion in open court than in the interrogation room, and coercion in court is less likely to produce false testimony than the coercion condemned in Miranda. Thus, convictions obtained in violation of Miranda are more likely to be untrustworthy than convictions secured without the judicial advice appellee would require. The case of retroactivity is stronger here, then, than in Johnson. Cf. People v. Glaser, supra at 830-31.[3/]

Where the proposed rule corrects a sin of omission rather than one of commission, the state's reliance upon existing law requires little justification. Law enforcement officers are not the constitutional wrongdoers here; it is the judiciary which appellee finds derelict. We submit, however, that state courts had no reason to believe that existing

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3. To the extent that the requested admonition would protect those values reflected in the Fifth Amendment, the purpose of the warning is not served by applying it to final judgments. Tehan v. Shott, supra.

judicial procedures were constitutionally offensive. Certainly there was no hint of this in Wilson v. United States, supra, in Powers v. United States, supra, or in any other decision. Appellee may demand prescient jurists; the Constitution does not. The important point is that the procedure condemned by appellee was not relied upon by the State to secure criminal convictions. Thus, it cannot be argued that illegitimate state reliance favors retroactivity.

Any retroactive ruling disrupts the administration of justice. Here there would be a windfall to an unknown number of guilty persons whose convictions are unquestionably reliable and who could not practicably be retried. The number of prisoners affected is not the exclusive measure for determining what is a permissible disruption of the administration of justice. See DeStefano v. Woods, ___ U.S. ___, 88 S.Ct. 2093 (1968). The unhappy spectacle of criminals going free for reasons unrelated to the trustworthiness of their convictions seriously damages public respect for our judicial system and supplies sufficient reason for denying retroactivity.

III

APPELLEE EFFECTIVELY WAIVED HIS CONSTITUTIONAL RIGHT TO COUNSEL.

Appellee contends that he did not effectively waive counsel. The record indicates that at the preliminary hearing in the San Francisco Municipal Court the appellee was represented by the public defender and was held to answer for trial.

Appellee thereafter appeared in Superior Court for

arraignment. At that time the appellee was asked, "Do you have an attorney or money to hire an attorney?" The appellee replied, "No, sir, I wish to exercise my constitutional prerogative, if I may, and act as my own counsel, sir." (ART[4/] 1:4-8).

After being arraigned on the charge, the following ensued:

"THE DEFENDANT: And I pray the Court's indulgence at this time, then, in view of that, to remain here at the County Jail, if I may, instead of going down to Bruno, as I would be asking the Public Defender's office for legal advice, and so forth, and there would be the subpoenaing of records that I should like to have.

THE COURT: I have no control over the jail. I have no control over that. It's up to them.

MR. BOWIE: Well, your Honor, under the circumstances, would I be entitled to the facilities of the Public Defender's office?

THE COURT: I think you should accept the Public Defender's office right now. That's my advice to you.

THE DEFENDANT: Your Honor, with all due respect to the Court, without seeming to be pretentious or obstinate, I realize the Public Defender's office has been rather pressed for time. My experience in the past did not give them the time to look into my case or give me proper representation. I would be happy to

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4. As hereinafter used, "ART" refers to the Augmented Reporter's Transcript on appeal.

coordinate with the Public Defender's office.

THE COURT: All right, let's set it for trial." (ART 2:18 - 3:12).

Two days after this arraignment, appellee again appeared in Superior Court and the following occurred:

"THE DEFENDANT: At this time, your Honor, after due thought and consideration, I would like to waive the jury trial, submit myself to the judgment of this Court at the earliest possible trial date, if I may.

THE COURT: You want to waive a jury trial, is that it?

THE DEFENDANT: Yes, sir.

THE CLERK: Consent to that?

MR. MAURER: Yes, the People consent.

THE COURT: All right, what date?

MR. MAURER: Would you want to submit the matter on the transcript?

MR. DRESOW: Oh, don't take advantage of him that way. He doesn't understand that. Why don't you set it down for the 20th, Friday, the 20th? He doesn't understand that. Let the Court --

THE COURT: Why don't you, why don't you let the Public Defender --

MR. DRESOW: We don't want him, Judge, but I don't want him taken advantage of.

THE COURT: Why don't you let him help you on this matter? You're waiving a jury trial, and we're putting it down for --

MR. MAURER: February 20th.

MR. DRESOW: January 20th.

THE COURT: You talk to the District Attorney.

THE DEFENDANT: May I enter a plea for my hearing in Municipal Court to be given to me?" (RT 1:8 - 2:9).

Examination of the above particular facts and circumstances surrounding appellee's appearance in Superior Court compels the determination that appellee's refusal of counsel was intentional and reflected his own desire and volition.

Appellee is attacking the validity of a conviction entered in the San Francisco Superior Court over five years ago. When collaterally attacked, a judgment of a court carries with it a presumption of regularity and cannot be lightly set aside.

> "Where a defendant without counsel acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to the assistance of counsel." Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Moore v. Michigan, 355 U.S. 155, 161 (1957).

Appellee relies on Von Moltke v. Gillies, 332 U.S. 708 (1948), as requiring a constitutional formula which must be followed by a state trial judge in order to determine whether a criminal defendant has waived his right to counsel. Von Moltke imposes no such seclusions of inquiry on state

courts.

The type of judicial inquiry which Mr. Justice Black outlined in Von Moltke as necessary for a valid waiver of counsel was subscribed to by only four justices of the Court. Of course, "lack of agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases." See United States v. Pink, 315 U.S. 203, 216 (1942). Moreover, the requisites discussed in Von Moltke have not, to appellant's knowledge, been adopted by either the United States Supreme Court or any Court of Appeals as an absolute constitutional standard against which any alleged waiver of counsel must be measured. See, e.g., Twining v. United States, 321 F.2d 432, 434-35 (5th Cir. 1963).

Significantly, Von Moltke involved a federal conviction to which Rule 11 of the Federal Rules of Criminal Procedure applied. Thus, Mr. Justice Black spoke of "the solemn duty of a federal judge." 332 U.S. at 722. And the Courts of Appeal apparently have understood the requirements discussed in Von Moltke to be inspired by Rule 11 and thus limited to federal cases. See, e.g., United States v. Lester, 247 F.2d 496, 499-500 (2d Cir. 1957); Aiken v. United States, 296 F.2d 604, 606-07 (4th Cir. 1961); United States v. Smith, 337 F.2d 49, 55 (4th Cir. 1964); United States v. Diggs, 304 F.2d 929, 930 (6th Cir. 1962); Shelton v. United States, 242 F.2d 101, 112 (5th Cir. 1957).

Even though the standards discussed in Von Moltke may in fact furnish "certain guidelines for the District

Courts," even in these courts "the ultimate issue is simply whether the accused knowingly and intelligently chose to waive counsel." United States v. Smith, supra at 55.

Judge Neubarth of the San Francisco County Superior Court found in the state court proceeding seven years ago that appellee competently waived his right to counsel. Judge Neubarth was in a position to observe appellee and to evaluate his responses. Certainly, "the demeanor, the facial expression and the responses made by the accused soon may convincingly disclose to an experienced trial judge whether the accused is intelligently and understandingly waiving his constitutional right." Davis v. United States, 123 F.Supp. 407, 412 (D. Minn. 1954), aff'd, 226 F.2d 834 (8th Cir. 1955), cert.denied, 351 U.S. 912 (1956).

Appellee was a mature adult, not unfamiliar with court proceedings since he had a prior criminal conviction. Appellee, represented by counsel at the preliminary hearing, expressly informed the trial judge that he wished to exercise his "constitutional prerogative" to act as his own counsel. Thus, Patton v. State of North Carolina, 315 F.2d 643 (4th Cir. 1963), cited by appellee is clearly not applicable to the instant case since there the defendant, after dismissing his retained counsel, requested the services of another attorney. During voir dire of the jury appellee again requested the services of a lawyer. Thus, there was no express waiver of counsel as in the instant case but rather a specific and repeated request for an attorney which was ignored by the trial court. As the court there

pointed out, "We conclude that Patton could not reasonably be held to have intelligently and understandingly waived a constitutional right which he, at the very moment of being put to trial, continued to assert." Id. at 646. So, too, Carnley v. Cochran, 369 U.S. 506 (1962), is inapposite since petitioner there was never advised of his right to counsel or offered counsel.

It is clear that appellee was furnished with the services of the public defender, availed himself of those services at the preliminary hearing, and thereafter refused the further services of the public defender. He was not forced to represent himself but he chose of his own free will to do so. Unless there were grounds warranting that refusal, the failure to accept the proffered services was an effective waiver of his right to counsel. United States v. Johnson, 333 F.2d 1004 (6th Cir. 1964); Johnson v. United States, 318 F.2d 855 (8th Cir. 1963); Arrelanes v. United States, 302 F.2d 603 (9th Cir. 1962); Collins v. Heinze, 125 F.Supp. 186 (N.D. Cal. 1954), aff'd, 217 F.2d 62 (9th Cir.), cert. denied, 349 U.S. 940 (1955); People v. Ortiz, 195 Cal.App.2d 112, 15 Cal.Rptr. 398 (1961); People v. Green, 191 Cal.App.2d 280, 12 Cal.Rptr. 591 (1961); People v. O'Neill, 78 Cal.App.2d 888, 179 P.2d 10 (1947). There is no suggestion that the public defender was not competent or for any other reason was not qualified. The appellee simply chose to run his own show. By his rejection of the public defender and his action in taking over his own defense, Bowie effectively waived his right to the assistance of counsel.

When it appeared as it did to the trial court that the appellee knew what he was doing it would have been error to force counsel not of his choice upon him. Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942); Reynolds v. United States, 267 F.2d 235 (9th Cir. 1959). It is manifestly apparent that appellee, fully aware of his right to be represented by counsel, made an informed choice.

Appellee was not denied his constitutional right to counsel by the state courts. A consideration of the surrounding facts and circumstances compels the conclusion that the appellee knowingly discharged his appointed counsel and further rejected the court's advice regarding counsel.

IV

THE APPELLEE'S ADMISSIONS WERE VOLUNTARY.

Appellee now contends that the statements he made to the arresting officers were involuntary. It should initially be noted that the appellee was convicted of the offense of assault with a deadly weapon in February of 1961. Throughout the entire appellate process, including a petition for certiorari to the United States Supreme Court, appellee never claimed that the confession was involuntary. Thereafter appellee instituted a series of habeas corpus petitions in both state and federal courts (Appellant's Opening Brief, pp. 2-4). Appellee did not claim that any of his statements were involuntarily obtained in any of these proceedings until his appeal from a denial of a writ of habeas corpus in the latter part of 1966.

Before discussing the facts and circumstances surrounding appellee's statements it should be noted that Bowie's

conviction was obtained and trial completed prior to the effective date of Miranda v. Arizona, 384 U.S. 436 (1966), and Escobedo v. Illinois, 378 U.S. 478 (1964). The rulings in each of these cases are not to be applied retroactively and are therefore inapplicable here. Johnson v. New Jersey, 384 U.S. 719 (1966). Davis v. State of North Carolina, 384 U.S. 736 (1966), relied on by the appellee does not require a different result. In that case the Supreme Court, after holding that the failure to advise suspects of their rights regarding counsel and to remain silent are proper factors in considering voluntariness, went on to find that the appellee's confession was the involuntary end product of coercive influences and thus constitutionally inadmissible in evidence. In Davis the prisoner was an impoverished Negro who had been interrogated repeatedly over a period of sixteen days before he finally confessed, during which time the only persons who saw him were state authorities. The facts in Davis are clearly distinguishable from those in the present case. Bowie gave his statement to the police within a few minutes after his arrest and while still at the scene of the offense. He repeated his statement shortly after his arrival at the police station. None of the coercive factors stressed by the Supreme Court in Davis are present in this case. The only similarity was the failure to inform Bowie of his rights. It is clear however that a failure to warn accused persons of their rights is but one of many factors to be considered upon the question of voluntariness and does not itself render defective an otherwise valid confession. Johnson v. New Jersey, supra.

Boulden v. Holman, 385 F.2d 102 (5th Cir. 1967).

Here a consideration of the totality of the circumstances does not even plausibly suggest that Bowie's will was overcome but rather demonstrates that the confession was made freely, voluntarily and without compulsion or inducement of any sort.

When the police officers arrived in the lobby of the hotel they saw appellee slashing at the victim with a knife. When the officers ordered the appellee to stop and drop the knife he then turned around and came towards the officers with the knife in his hand. The officers then rushed appellee and eventually disarmed him. While the officers were outside the hotel waiting for the patrol wagon, the appellee said that he wished he had killed the man he had stabbed and that he would have killed him if the police had not arrived. When appellee was thereafter brought to the police station he repeated this statement. The officer testified that the appellee did not appear to be intoxicated, that appellee was coherent, that no promises or threats of any kind were made to the appellee, and that the statement was free and voluntary.

Although the appellee claimed that he was under the influence of alcohol any such condition was denied by the officers present at the time of the statement and hence there existed a conflict in the evidence which the trier of fact must determine. Even assuming the appellee was under the influence of intoxicating liquors, intoxication at the time of making confessions does "not deprive the confessions of the required spontaneity to make them free and voluntary."

People v. Byrd, 42 Cal.2d 200, 266 P.2d 505 (1954). The drunken condition of an accused when making a confession unless such drunkenness goes to the extent of mania does not affect the admissibility of the confession into evidence although it may affect its weight and credibility with the jury. Mergner v. United States, 147 F.2d 572 (D.C. Cir. 1945), cert.denied, 325 U.S. 850 (1945). Thus, the evidence before the trial court showed that appellee made the statement within minutes after his arrest while standing on the sidewalk in front of the hotel; the appellee was coherent and was not intoxicated; and the statement was freely given without any threats or promises. It is, therefore, submitted that the state court record adequately establishes the voluntariness of the statement.

CONCLUSION

For the foregoing reasons, appellant respectfully requests that the order granting the writ of habeas corpus entered by the court below be reversed and the proceedings dismissed.

Dated: September 5, 1968

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

Dated: San Francisco, California

September 5, 1968

EDWARD P. O'BRIEN
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